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Eminent Domain—Retention Value As An Element of Valuation

In 1940 the plaintiff, a Swiss firm, purchased 420 metallic railway tires from an American firm, but was unable to ship them to Switzerland through the existing British blockade. Plaintiff then made extensive efforts to dispose of the tires, but because of their unusual dimensions was able to sell only 212 of them. In 1943, defendant, the United States Government, requisitioned the remaining 208 tires and awarded the plaintiff \$1,003.14, the value of the tires as scrap iron. Plaintiff refused the award claiming that even though no market was available for the unsold tires, the tires should have been valued at the existing price of \$8,100.84 on the domestic market or \$9,180.95 on the foreign market. *Held*: because no adequate market value was available, the actual value of the tires in light of the surrounding facts, circumstances, and conditions was \$4,000.¹

The power to requisition private property for public use is limited by the constitutional guarantee of just compensation.² The conventional criterion for just compensation is the price the property would bring on the open market by a "willing seller" to a "willing buyer."³ But market value cannot be a rigid standard in all cases, for occasionally the existing market price may be a wholly inadequate measure of just compensation.⁴ This may be true where the market price includes enhancement of value arising from the government's demand for the

¹ *Swiss Federal Rys. v. United States*, 112 F. Supp. 357 (Ct. Cl. 1953).

² U.S. Const. Amend. V.

³ *United States v. Miller*, 317 U.S. 369 (1943); *Olson v. United States*, 292 U.S. 246 (1934); *Vogelstein & Co. v. United States*, 262 U.S. 337 (1923); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); 4 *Nichols*, *Eminent Domain* § 12.1 (3d ed. 1951); *Orgel*, *Valuation Under Eminent Domain* § 16 (1936).

⁴ *United States v. Cors*, 337 U.S. 325 (1949); 4 *Nichols*, *Eminent Domain* § 12.1 (3d ed. 1951).

requisitioned property.⁵ Conversely, market value may be just as inadequate where it fails to include all relevant considerations of value.

That there was no adequate market available in the instant case seems a proper finding in light of these past cases, and in such a situation the court must then look to other measures of valuation. One of these measures, that of retention value, concerns the value which may be realized by retaining property for future disposal. This measure was advanced where an owner of requisitioned property sought an award in excess of existing OPA price regulations. But retention value was expressly rejected by the United States Supreme Court as an improper measure of value in that case.⁶

The primary reason for rejection of retention value has been that it is highly speculative.⁷ Recognizing this objection, the court in the instant case expressly rejected it as an element in computing the final allowance. But notwithstanding this declaration, the court went on to award \$4,000 for the tires—an amount which would seem to be based necessarily on retention value, since the only value of the tires for other than scrap iron must have rested on their retention for possible future use or sale, there being no present market for the tires.⁸

This indirect recognition of retention value by the court, labeling it actual value, may have stemmed largely from the fact that the main objection to retention value, its speculative quality, was not particularly applicable in the instant case. That is, although retention value may usually be a highly speculative measure of value in contrast to market value, and hence objectionable, once market value has been discarded as being inadequate, the objection immediately becomes less forceful. For it then appears that an acceptable measure of value which is not subject to a high element of speculation is practically unobtainable. This being true, the objection to retention value is substantially mitigated and its consideration as an element of recovery may seem completely proper.

It is submitted, therefore, that although retention value has been held as not properly an element of valuation, evidence of it may have some effect on the decision of a court. For if the facts indicate that the usual objection of speculativeness does not exist, the court may indirectly include such value in arriving at its award, even though seemingly bound to formally reject it.

CHARLES J. BURMEISTER, '55

⁵ *United States v. Miller*, 317 U.S. 369 (1943).

⁶ *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950).

⁷ The other objection—that retention designed to await lifting of government price restrictions should not be encouraged—is not pertinent to this analysis of the instant case.

⁸ See *Swiss Federal Rys. v. United States*, 112 F. Supp. 357 (Ct. Cl. 1953) (dissenting opinion).